Supreme Court, U.S.
FILED
JUL 24 2003
CLERK

No. 02-682

(18)

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

STEVEN SEMERARO *
Associate Dean for Academics &
Associate Professor of Law
THOMAS JEFFERSON SCHOOL OF LAW
2121 San Diego Avenue
San Diego, CA 92116
(619) 297-9700

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

38 pp

QUESTION PRESENTED

Whether the court of appeals erred in reversing the district court's dismissal of respondent's antitrust claims.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
CONSENT OF PARTIES	1
INTEREST OF *AMICI*	1
STATEMENT	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. The Amended Complaint Alleges A Section 2 Claim By Challenging Inefficient Conduct	8
A. A Monopolization Claim Requires Conduct That Restrains Competition On Some Basis Other Than Efficiency	8
B. The Amended Complaint Alleges Predatory Conduct Under *Aspen And Kodak*	10
C. This Court Should Reject The Contention That Verizon's Conduct Can Be Judged Procompetitive As A Matter Of Law	11
1. Predatory Conduct That Harms Consumers Cannot Be Saved By Labeling It A Legitimate Business Decision	12
2. Verizon's Conduct Makes No Business Sense In An Interconnected Network Market Except For Its Tendency To Preserve Verizon's Monopoly Power	14

TABLE OF CONTENTS—Continued

	Page
3. The United States Mischaracterizes The Predatory Act Inquiry As Requiring The Monopolist To Bear Short-Run Losses	15
4. Verizon Mischaracterizes This Court's Precedent As Anti-Discrimination Law	17
5. Permitting This Case To Proceed To Discovery Would Not Threaten Consumer Interests	18
D. The Telecommunications Act Of 1996 Strengthens Trinko's Monopolization Claim	21
1. Regulatory Review Does Not Supplant Antitrust Review	21
2. The 1996 Act Should Weigh In Favor Of Finding Antitrust Liability	24
3. The 1996 Act Does Not Create Anticompetitive Duties	26
II. Neither The Essential Facilities Nor Monopoly Leveraging Doctrines Are At Issue Here	29
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	9, 10, 27
Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)	19
Brooke Group v. Brown & Williamson, 509 U.S. 209 (1993)	20
California Dental Ass'n. v. FTC, 526 U.S. 756 (1999)	29
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)	20
Cavalier Tel., L.L.C. v. Verizon Va. Inc., 208 F. Supp. 2d 608 (E.D. Va. 2002), *aff'd*, 330 F.3d 176 (4th Cir. 2003)	4
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)	20
Covad Communications Co. v. Bell Atl. Corp., 201 F. Supp. 2d 123 (D.D.C. 2002)	4
Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002)	4
Davis v. Pac. Bell, 204 F. Supp. 2d 1236 (N.D. Cal. 2002)	4
Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)	2, 8, 10, 19, 20, 21
FTC v. Ticor Title Ins., 504 U.S. 621 (1992)	23
Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000)	4
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	22, 23, 24
Intermedia Communications, Inc. v. BellSouth Telecomms., Inc., 173 F. Supp. 2d 1282 (M.D. Fla. 2000)	4

TABLE OF AUTHORITIES—Continued

	Page
Iowa Utilities Bd v. FCC, 219 F.3d 744 (8th Cir. 2000), *rev'd in part on other grounds, AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999)	28
Maple Flooring Manufacturers Assn. v. United States, 268 U.S. 563 (1925)	19
Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	17, 19
MCI Communications Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983)	25, 26
MGC Communications, Inc. v. BellSouth Telecomms., Inc., 146 F. Supp. 2d 1344 (S.D. Fla. 2001)	4
NCAA v. Board of Regents, 468 U.S. 85 (1984)	9, 13
NYNEX v. Discon, 525 U.S. 128 (1998)	19
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	15, 25
Olympia Equipment Leasing v. Western Union Telephone Co., 797 F.2d 370 (7th Cir. 1986)	18
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	9
State Oil Co. v. Khan, 522 U.S. 3 (1997)	19
Stein v. Pac. Bell Tel. Co., 173 F. Supp. 2d 975 (N.D. Cal. 2001)	4
Supra Telecomms. & Info. Sys., Inc. v. BellSouth Telecomms., Inc., 2001 U.S. Dist. LEXIS 23816 (S.D. Fla. June 8, 2001)	4
Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990)	24
United States v. Griffith, 334 U.S. 100 (1948)	8
United States v. Grinnell Corp., 384 U.S. 563 (1966)	2, 8
Verizon v. FCC, 535 U.S. 467, 497-528 (2002)	28

TABLE OF AUTHORITIES—Continued

STATUTES	Page
47 U.S.C. § 152	22
47 U.S.C. § 252(d)(1)	28
47 U.S.C. § 252(d)(3)	28
47 U.S.C. § 253(a)	1
47 U.S.C. § 257(b)	1, 28
Pub.L. No. 104-104, 110 Stat. 56, 56 (1996)	22
OTHER AUTHORITIES	
IA Philip Areeda & Herbert Hovenkamp, Antitrust Law (1997)	24
Joel I. Klein, The Race for Local Competition: A Long Distance Run, Not a Sprint (Nov. 5, 1997) (available at http://www.usdoj.gov/atr/public/speeches/1268.htm)	23
Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209 (1986)	16
Richard S. Markovits, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63 Tex. L. Rev. 41 (1984)	16
Steven Semeraro, The Antitrust-Telecom Connection, 40 San Diego L. Rev. 555 (2003)	22, 23
Philip Weiser, Federal Common Law, Cooperative Federalism, and The Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692 (2001)	24
Philip J. Weiser, Goldwasser, The Telecom Act and Reflections on Antitrust Remedies, 55 Admin. L. Rev. 1 (2003)	25

CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief *amici curiae*. Their written consents have been filed with the clerk of this Court.

INTEREST OF *AMICI*

This brief *amici curiae* is submitted on behalf of the legal academics listed in the appendix to this brief. They are are teachers and scholars of federal antitrust law. Like the enforcement agencies, these *amici* academics seek to ensure a proper interpretation and application of those laws. The *amici* have received no compensation for submitting this brief.

STATEMENT

This case arises under § 2 of the Sherman Act and involves the sufficiency of allegations of anticompetitive conduct in the market for local telephone service. Historically, federal and state regulators sought to protect the telephone-using public by regulating local telephone service monopolists. In the Telecommunications Act of 1996, Congress preempted the laws designed to maintain this monopoly structure, 47 U.S.C. § 253(a), and mandated that thenceforth "vigorous economic competition" in local telephone service would be national policy, 47 U.S.C. § 257(b).

To overcome the entrenched position of the incumbent local exchange carriers ("ILECs"), Congress imposed a duty to cooperate in providing local service. This duty mirrors the cooperative practices that have flourished in the comparable competitive, long distance telephone service market. First, all local service competitors must interconnect, just as all local and long distance providers interconnected as a result of the antitrust litigation against AT&T. Second, ILECs must offer competitors their service in bulk at wholesale rates for resale, a common practice among long distance telephone service providers. And third, incumbents must offer certain elements of their network, such as the local loops necessary to reach

each telephone user, on an unbundled basis at reasonable rates. Again, this requirement resembles the regular practice in the long distance markets in which ILECs permit long distance providers to use local loops and other local network elements to reach their customers.

In this case, Respondent, Law Offices of Curtis V. Trinko ("Trinko"), sued Bell Atlantic Corporation, now Verizon Communications Inc. ("Verizon") alleging that Verizon, an ILEC, violated § 2 of the Sherman Act by failing to interconnect efficiently with competitive local exchange carriers ("CLECs"). Verizon had previously entered inter-connection agreements with CLECs as required by the 1996 Act. Trinko alleged, however, that Verizon sought to undermine the very competition that the interconnection agreement was intended to enable. Verizon accomplished this objective by providing inferior interconnection services to the CLECs' customers, thereby "making it difficult for [their competitors] . . . to obtain full use of [the] local [telephone] lines." J.A. 35 (Am. Compl. ¶ 2). Verizon moved to dismiss this claim, and the issue here is whether Trinko's allegations are sufficient to establish a §2 violation.

The basic elements of a § 2 claim are well established. "The offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966)).

Verizon does not contend that Trinko failed to allege monopoly power in the market for local telephone service. This case thus turns entirely on whether Trinko alleged facts sufficient to establish the second element of the monopolization test, *i.e.* whether Verizon *willfully* maintained its power.

Trinko's allegations track this Court's pronouncements with respect to § 2 claims. Paragraph 21 of the Amended Complaint sets out some of the challenged conduct, alleging as follows:

> Bell Atlantic has not afforded CLECs access to the local loop on a par with its own access. Among other things, Bell Atlantic has filled orders of CLEC customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for CLEC customers substantially identical in circumstances to its own local phone service customers for whom it has filled orders on a timely basis, and has systematically failed to inform CLECs of the status of their customers' orders with Bell Atlantic. J.A. 39 (Am. Compl. ¶ 21).

Additional paragraphs allege that this conduct has had the requisite effect on competition that this Court has required to state a monopolization claim. Paragraph 52 alleges that Verizon was "attempting to exclude or reduce the market share of rivals in the Local Phone Service [market] *on a basis other than efficiency*, *i.e.*, by making it difficult for its competitors to provide service in the Local Phone Service market on the level that Bell Atlantic is able to provide to its customers in that market." J.A. 46 (Am. Compl. ¶ 52) (emphasis added). And ¶ 57 alleges anticompetitive effect, asserting that Verizon's "conduct has directly and adversely impacted upon the ability of consumers . . . to obtain satisfactory Local Phone Service" and that "[t]here is no valid business reason for Bell Atlantic's behavior with respect to providing access to its local loop." J.A. 47 (Am. Compl. ¶ 57).

The district court dismissed the claim on the ground that these allegations were insufficient to state a claim. Pet. App. 49a-61a, 64a-68a. The Second Circuit reversed on the issue before this Court. Pet. App. 1a-48a.

This is but one of several recent antitrust cases in which consumers and competitors have charged ILECs with preventing or delaying CLECs from entering local telephone service markets.[1] The conduct alleged in these cases has been similar to the conduct alleged by Trinko. For example, Cavalier Telephone alleged "that Verizon mis-routed Cavalier's calls, . . . supplied Cavalier with an inferior Web interface for use in ordering loops, . . . and . . . intentionally made the billing process for loops costly for its competitors." *Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, 208 F. Supp. 2d 608, 612 (E.D. Va. 2002), *aff'd*, 330 F.3d 176 (4th Cir. 2003). And Covad Communications alleged that Bell South delayed interconnection; imposed unnecessary costs on its competitors; and strategically understaffed certain operations to delay Covad's customers' ability to obtain service. *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1277-78 (11th Cir. 2002). If the allegations in these cases are true, there is a nation-wide pattern of behavior by incumbent local telephone companies that is restraining the growth of competition in local telephone service. The question posed in this case is whether these allegations can be tested in a § 2 case.

---

[1] *Covad Communications Co. v. Bell Atl. Corp.*, 201 F. Supp. 2d 123 (D.D.C. 2002); *Cavalier Tel., L.L.C. v. Verizon Va. Inc.*, 208 F. Supp. 2d 608 (E.D. Va. 2002), *aff'd*, 330 F.3d 176 (4th Cir. 2003); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002); *Davis v. Pac. Bell*, 204 F. Supp. 2d 1236, 1242 (N.D. Cal. 2002); *Supra Telecomms. & Info. Sys., Inc. v. BellSouth Telecomms., Inc.*, 2001 U.S. Dist. LEXIS 23816 (S.D. Fla. June 8, 2001); *MGC Communications, Inc. v. BellSouth Telecomms., Inc.*, 146 F. Supp. 2d 1344 (S.D. Fla. 2001); *Stein v. Pac. Bell Tel. Co.*, 173 F. Supp. 2d 975 (N.D. Cal. 2001); *Intermedia Communications, Inc. v. BellSouth Telecomms., Inc.*, 173 F. Supp. 2d 1282 (M.D. Fla. 2000); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).

SUMMARY OF ARGUMENT

I. The amended complaint alleges a claim under § 2 of the Sherman Act because Trinko has alleged that Verizon has (1) monopoly power in the local telephone service market and (2) engaged in inefficient conduct designed to, and with the effect of, maintaining that monopoly power.

In cases challenging a monopolist's refusal to deal, this Court has required the plaintiff to prove that the defendant engaged in inefficient conduct that harms *consumers* by increasing price and reducing output, quality, or consumer choice. Here Trinko alleges that Verizon interfered with the efficient interconnection of its local telephone network to the operations of CLECs. That conduct is inefficient because it hinders the ability of consumers to obtain local telephone service from the carrier that provides the price, quality, and service combination that is most desirable to each customer. Because Trinko alleges that Verizon has no legitimate business justification for this conduct, it states a § 2 claim.

Verizon and the United States argue for dismissal on the ground that only a refusal that serves no purpose but to preserve monopoly power may be predatory. Although that standard is defective for failing to focus on consumer welfare, it nonetheless would not support dismissal here. In a network market such as local telephone service, all competitors depend on the efficiency of the interconnection. No rational firm in a competitive network market would intentionally undermine that efficiency goal for fear of reprisal from its competitors. Verizon's alleged conduct makes economic sense only if it enabled Verizon to maintain its monopoly power.

The United States also appears to argue that only refusals to deal that cause a monopolist to sacrifice short run profits may be predatory. But a monopolist is more likely to engage in anticompetitive schemes that do not require it to bear such

losses. As a result, § 2 should extend to profitable conduct that inefficiently excludes competitors. The appropriate focus is on the effect of the refusal on consumer welfare, not corporate profits.

Verizon contends that a refusal to deal may be predatory only where the monopolist has previously offered the same product to another competitor on terms denied to the plaintiff. That anti-discrimination principle finds no support in the Sherman Act case law. This Court has favored a case-by-case analysis of the actual competitive effects of the challenged conduct in the relevant market rather than bright line rules of *per se* legality. And that careful analysis simply cannot be conducted on the pleadings. Moreover, it would provide a perverse incentive for a monopolist to avoid procompetitive cooperation for fear that entering a deal with one competitor would expose it to antitrust liability if it failed to offer the same deal to all.

The 1996 Telecommunications Act strengthens Trinko's monopolization claim. The Act contains an explicit antitrust savings clause requiring that conduct covered by the 1996 Act must be scrutinized under the antitrust laws. Congress thus made patently clear its intent to require antitrust review of conduct falling within the confines of the 1996 Act.

Despite the clear language of the statute, Verizon in effect argues for an antitrust exemption. Because courts regularly pursue consumer welfare goals in antitrust cases, however, telecom regulators have no special advantage in evaluating conduct under the 1996 Act. In any event, the record before this Court is insufficient to establish whether the scope of review by telecom regulators would be sufficient to protect antitrust goals even if preemption were an option.

Far from exempting otherwise illegal conduct, the 1996 Act should assist the Court in determining that the challenged conduct is potentially predatory. Although a violation of the

1996 Act is not *ipso facto* a violation of the Sherman Act, Congress' decision to require certain cooperative behavior to enable competition to emerge is a factor that weighs against dismissing the complaint.

Verizon argues that despite Congress' intentions, the duties imposed by the 1996 Act are likely to have anticompetitive effects that conflict with the antitrust laws, and that courts are incapable of implementing these duties. Although economic theory recognizes the possibility that the cooperative duties imposed by the 1996 Act may yield anticompetitive results, those duties may yield procompetitive outcomes as well. A court cannot chose between those possibilities without evidence of actual effects in the relevant market; therefore this case should not be resolved on a motion to dismiss.

Finally, an antitrust court need not interfere with regulatory implementation of the 1996 Act. As has been true in past antitrust cases involving regulated industries, a court must carefully tailor any injunctive order to supplement rather than inhibit regulatory activity. An order requiring Verizon not to hinder efficient interconnection would not intrude on any regulatory function or embroil the courts in matters that they are incapable of administering.

II. The essential facilities and monopoly leveraging doctrines are not relevant to the threshold decision before this Court. The United States correctly asserts that harm to competition, rather than the formal satisfaction of the elements of a monopolization doctrine, must be the touchstone of antitrust liability. In appropriate cases, however, the essential facilities or monopoly leveraging doctrines may provide useful frameworks for courts analyzing competition in a particular market.

ARGUMENT

I. THE AMENDED COMPLAINT ALLEGES A SECTION 2 CLAIM BY CHALLENGING INEFFICIENT CONDUCT

To state a § 2 claim, a plaintiff must allege that the defendant (1) possesses "monopoly power in the relevant market" and (2) willfully acquired or maintained "that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966)). Trinko alleges, J.A. 45 (Am. Compl. ¶ 48), and Verizon does not dispute, that monopoly power is adequately stated. The only issue is whether the amended complaint alleges conduct sufficient to meet the second element. Under this Court's precedents, Trinko has properly alleged its claim because undermining the efficiency of the interconnection in a network market may exclude efficient competitors to the detriment of consumers. Verizon's violation of a duty under the 1996 Act reinforces and strengthens that conclusion because Congress's decision to compel cooperation in local phone service is strong evidence that cooperation is efficient, and thwarting it is an anticompetitive, inefficient business practice.

A. A Monopolization Claim Requires Conduct That Restrains Competition On Some Basis Other Than Efficiency

The second element of the monopolization test requires more than the mere possession of monopoly power and the intent to keep it. To violate the Sherman Act, a monopolist must use its "power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Kodak*, 504 U.S. at 483 n.32 (quoting *United States v. Griffith*, 334 U.S. 100, 107 (1948)). What it means to *use* monopoly

power in one of these inappropriate ways is at the heart of this case.

This Court addressed that issue most directly in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985). There it explained that while the defendant's intent to injure a competitor, and the effect of its conduct on competitors, is relevant, a court must also consider the impact of the defendant's conduct "on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605.

A clear focus on the effect of a business practice on consumers is essential because "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). Even pro-competitive, consumer-welfare enhancing conduct may intentionally harm one's competitors. Price cutting and innovation to increase quality, for example, may intentionally drive less efficient competitors from the market. Nevertheless, conduct of this nature does not meet the second element of the monopolization test because consumers benefit from lower prices and higher quality products. The ability of competitors to attract business is adversely affected only to the extent that they are *less efficient* than the monopolist and hence unable to match its price/quality package.

Under §2, a monopolist's conduct can be characterized as unlawfully predatory only when it restrains the output of competitors that are at least as efficient as the monopolist. As the *Aspen* Court put it, "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* In this context, an efficient practice is one that provides consumers with more and better products at lower prices. An inefficient practice is one that increases price and decreases quality, output, or consumer choice.

In *Aspen*, the defendant refused to cooperate with the plaintiff to offer a ski lift ticket that would allow skiers to choose any of the four local mountains. First, the Court observed that multi-mountain lift tickets were common in competitive ski markets, including *Aspen* before the defendant had obtained monopoly power, and thus consumers presumably valued them over single mountain tickets. *Id.* at 603. Second, the Court carefully explored the evidence, finding that consumers would be injured if the all-mountain pass were not available. *Id.* at 605-07. Third, the Court explained that the defendant's conduct had in fact restrained the plaintiff's ability to provide an all-mountain package. *Id.* at 607-08. Finally, the Court reviewed the defendant's arguments that sought to justify its refusal to cooperate on pro-competitive grounds, and the Court found that the jury had sufficient evidence to reject them. *Id.* at 608-09.

In *Kodak*, this Court engaged in a similar analysis on a sparse summary judgment record, emphasizing the difficulty of judging competitive effects without evidence of actual market conditions. There, the defendant refused to sell spare parts for its copiers to independent service organizations. In upholding the denial of summary judgment, the Court focused carefully on the potential effects of the defendant's refusal on consumers, *Kodak*, 504 U.S. 473-77, and carefully scrutinized the defendant's arguments that its practices were competitively justified, *id.* at 484-85. Although it recognized that the refusal to sell spare parts might well have been justified by the procompetitive explanations that Kodak put forward, this Court concluded that it simply could not evaluate those justifications "as a matter of law on a record this sparse." *Id.* at 486.

B. The Amended Complaint Alleges Predatory Conduct Under *Aspen and Kodak*

Unlike efficient practices such as price cutting or innovating, Verizon's alleged behavior bears none of the

common earmarks of efficient competition. Trinko alleges that Verizon was attempting to delay or prevent competitive entry into the market by providing inefficient interconnection services to the CLECs' customers. Like the conduct condemned in *Aspen* and *Kodak*, Verizon's alleged conduct directly injured consumers in the short run by limiting their ability to obtain timely local telephone service from the company of their choice.

Verizon's conduct unquestionably inconvenienced consumers who sought local telephone service from a CLEC. Trinko further alleges that the conduct made it extremely difficult for CLECs to compete, which seems obviously true, and that there was no legitimate, procompetitive benefit from Verizon's conduct. J.A. 47 (Am. Compl. 57). Assuming as this Court must that the allegations in the amended complaint are true, and drawing all reasonable inferences therefrom, the conduct alleged is fairly labeled predatory because it restrains competition by inefficiently hindering interconnection, not by cutting price or some other efficient practice.

C. This Court Should Reject The Contention That Verizon's Conduct Can Be Judged Procompetitive As A Matter Of Law

Although Verizon and the United States effectively concede that the challenged conduct injures consumers and restrains the ability of CLECs to compete in the short run, they nonetheless seek dismissal on the pleadings. Both admit, as they must, that this Court's precedents establish that antitrust sometimes requires monopolists to cooperate with rivals. Pet. Br. 17; Gov. Br. 13. They also recognize that Trinko has alleged that Verizon's specific conduct was not justified by any procompetitive effect. J.A. 47 (Am. Compl. 57). They contend, however, that no conceivable set of facts could support that allegation, and the case must therefore be dismissed without any discovery whatsoever.

Curiously, neither Verizon nor the United States explains how frustrating efficient interconnection could possibly be an efficient practice *as a matter of law*, particularly because the local telephone service market cannot function competitively unless the providers are interconnected. Instead, they attempt to cabin the concept of predatory conduct in a way that does not directly refer to consumer interests. Both contend that a refusal to deal may be predatory only when "it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." Gov. Br. 15; Pet Br. 11. In implementing that general standard, the United States essentially contends that only refusals that impose short-run losses on a monopolist can be predatory. Gov. Br. 16. Verizon goes a step further, arguing that even inefficient refusals to deal that have no purpose but to destroy competition are not predatory unless the monopolist has refused to offer one competitor terms that were previously offered to others. Pet. Br. 10. These arguments effectively transform the predatory act requirement from one that looks to consumer interests to one that safeguards business interests. That shift finds no support in this Court's precedents and would undermine the consumer welfare goals that the antitrust laws are intended to advance.

1. *Predatory Conduct That Harms Consumers Cannot Be Saved By Labeling It A Legitimate Business Decision*

Verizon's alleged conduct restrained the CLEC's ability to compete and injured local telephone service consumers by making it difficult for them to switch local carriers. Verizon and the United States argue that the complaint nonetheless fails to state a claim because Verizon's conduct may be characterized as a legitimate business decision. Both Verizon and the Government implicitly assume that conduct that on balance harms consumers may be immunized if it has a legitimate business purpose. That assumption is wrong.

The effect of the defendant's conduct on consumers should be the sole focus of the inquiry. To illustrate, introducing an improved product may drive the producers of older, inferior alternatives from the market and allow the innovator to attain or maintain a monopoly. Nevertheless, that innovator would not violate § 2. There are two analytical paths that lead to that conclusion. The wrong approach, apparently favored by Verizon and the Government, reasons that although innovation has the characteristics of a predatory act—*because it excludes competitors*—it is saved because innovation is a legitimate business practice. The correct approach recognizes that innovation is not predatory in any sense because it benefits consumers, in the short run, by providing a better product, and, in the long run, by spurring additional innovation competition to produce new, competitive alternatives at lower prices.

When the legitimate business justification inquiry is artificially separated from the inquiry into consumer interests, litigants and courts may mistakenly interpret the business justification question as an issue of the fairness of the defendant's business practices. The briefs of both Verizon and the Government are permeated with the notion that it is somehow unfair to compel ILEC's to share their resources in the way that the 1996 Act does. Although that point is debatable, it is also irrelevant to this case. Antitrust is not a code of business ethics designed to protect a monopolist's right to safeguard its supra-competitive profits. The Sherman Act is "a consumer welfare prescription," *NCAA*, 468 U.S. at 107, and therefore the effect of monopolistic conduct on consumers should be the ultimate determinate of whether a defendant has a legitimate reason to engage in conduct that reduces competition. To be sure, a healthy respect for business freedom is appropriate in antitrust cases because the freedom to compete often redounds to the benefit of consumers. But courts must engage the consumer-welfare inquiry; they should not simply assume that monopolists

have a right to refuse to deal irrespective of its effect on consumers.

Here, Verizon and the United States appear to argue that a monopolist's right to run its business as it sees fit justifies its failure to cooperate with competitors. While neither Verizon nor the government clearly explain why that should be so as a matter of antitrust law, presumably they would argue that consumers are better off in the long run if monopolists may refuse to cooperate with rivals to protect their monopoly profits in a way that encourages them to innovate. If the evidence supports the contention that the sort of cooperation sought here would in fact stifle innovation in the local telephone service market to the detriment of consumers, then Verizon should ultimately prevail in this case. The antitrust laws do seek to preserve all consumer-welfare-enhancing rivalry whether it be long-run innovation competition or short-run price competition. At this point, however, there are no facts in the record on which to test Verizon's contention.

2. *Verizon's Conduct Makes No Business Sense In An Interconnected Network Market Except For Its Tendency To Preserve Verizon's Monopoly Power*

Verizon and the Government would define predatory conduct narrowly to include only conduct that "makes no business sense *apart from* enabling monopoly returns" or "conduct necessarily tied to gaining or extending monopoly power." Pet. Br. 11; Gov. Br. 15. As explained above, that standard is faulty for failing to focus on the consumer interests that motivate the antitrust laws. Even assuming, incorrectly, that this approach were proper, it would provide no ground for dismissing this case.

Verizon contends that antitrust liability is inappropriate under its favored standard because violating the duties imposed by the 1996 Act makes business sense irrespective

of its tendency to preserve Verizon's monopoly. Presumably, Verizon contends that this is true because it can earn higher profits by ignoring its duty to efficiently interconnect even if its competitors continue to thrive.

This reasoning is seriously flawed. Local telephone service is a network market in which competitors must be interconnected to provide efficient service to their customers. In such a market, it would only make economic sense for a firm with monopoly power to adopt a policy of undermining the efficiency of the interconnection to inconvenience its competitors' customers. In a competitive market, any firm that attempted to act as Verizon allegedly did would face certain retaliation from its interconnected competitors in the form of poor service for its own customers. The ruinous effect on good will and customer relations would surely make the intentional interference with efficient interconnection a rare event. Only a monopolist that already has virtually all the customers (like Verizon), and hopes to stall competitive entry altogether, would find a scheme like that alleged here to be profitable in an interconnected market.

3. *The United States Mischaracterizes The Predatory Act Inquiry As Requiring The Monopolist To Bear Short-Run Losses*

Citing *Aspen*, the United States insinuates, but never explicitly says, that only conduct that causes the defendant to forgo short-run profits can ever be predatory in a unilateral refusal-to-deal case. Although the defendant in *Aspen* did bear immediate losses, the Court's analysis in that case—as described above—demonstrates that short-run sacrifice is not a threshold requirement for § 2 liability. This Court was most explicit in *Otter Tail Power* where it explained that in monopolization cases "[t]he promotion of self- interest alone does not . . . immunize otherwise illegal conduct." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (internal quotation marks omitted).

As a matter of antitrust policy, requiring an allegation of short-run losses in refusal-to-deal cases would be unwise. Not all conduct that excludes competition on some basis other than efficiency requires the defendant to sacrifice profit. On the contrary, whenever the defendant can increase a rival's costs, and as a result immediately capture additional profitable sales, it may be able to exclude efficient competition without suffering short-run losses. This point is well established in the academic antitrust literature. For example, in a widely cited Yale Law Journal article, antitrust lawyer Thomas Krattenmaker and antitrust economist Steven Salop, both of whom were then at Georgetown Law School, explained that "[r]aising rivals' costs can be a particularly effective method of anticompetitive exclusion [because it] need not entail sacrificing one's own profits in the short run . . . ."[2]

Verizon's refusal to efficiently interconnect, for example, could enable it to retain market share that would otherwise go to a CLEC by blocking or delaying competitive entry. Once a consumer becomes frustrated with its inability to switch to AT&T or another CLEC, its likely course of conduct would be to stay with Verizon. While Verizon's behavior may well increase the price for local telephone service and thus have an inefficient, output-reducing effect overall, the market-share-retention aspect of the restraint could allow Verizon to earn greater profits with its anticompetitive scheme in both the short and long runs. This is a likely result given that local telephone service is a necessity for which consumers have no

[2] Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L.J. 209, 224 (1986); *see also* Richard S. Markovits, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63 Tex. L. Rev. 41, 83 (1984) (explaining that "[s]uccessful predatory practices . . . do not necessarily cause a decrease in the predator's output or market share. By driving rivals out or deterring entry, these practices can enable sellers to obtain higher prices without such an adverse result.").

meaningful alternative. (Of course, any conclusion about the elasticity of the local telephone service market is the sort of fact question that needs to be addressed before this case should be ultimately decided on the merits.)

Far from indicating that Verizon's conduct was not predatory, its immediate gains *increase* the likelihood that it would engage in this type of predatory conduct. Anticompetitive schemes that require short-run losses are self-deterring because the monopolist can never be certain that it will be able to recoup its current losses. As this Court has explained, "such schemes are inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition . . . . *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain . . . . For this reason, there is a consensus among commentators that . . . schemes [requiring short-run losses] are rarely tried, and even more rarely successful." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

By contrast, when a monopolist can restrain competition by imposing costs on a competitor, it can thereby capture more profitable sales for itself immediately. Because this sort of scheme benefits the monopolist in the short run as well as the long run, a monopolist is more likely to attempt it. Defining predatory conduct to require short-run losses by the monopolist would effectively stand the Sherman Act on its head.

4. *Verizon Mischaracterizes This Court's Precedent As Anti-Discrimination Law*

Verizon contends that a monopolization claim for refusing to deal is stated only when a monopolist makes its product available to some competitors, but refuses to make that product available to others on the same terms. Pet. Br. 10 ("This essential circumstance of *discrimination among outsiders as would-be customers seeking the same good at*

the same price is not present in this case." (emphasis in original)).

Putting aside that this Court has wisely never suggested that the Sherman Act encompasses an anti-discrimination principle, Verizon's proposed rule would be counter-productive from an antitrust perspective. If the law required monopolists that open a cooperative channel with one competitor to open the floodgates to all, monopolists would have a strong incentive to avoid procompetitive, cooperative endeavors altogether. As Judge Posner has explained in a related context, if a monopolist knows "that by taking steps to promote competition it would be laying itself open to an antitrust suit . . . it probably would not have taken them. [Allowing a § 2 case to go forward on that ground] would thus undermine the objectives of antitrust law." *Olympia Equipment Leasing v. Western Union Telephone Co.*, 797 F.2d 370, 377-79 (7th Cir. 1986). The effects of a refusal to deal on consumers, not the relative treatment of different competitors, must be the yardstick by which monopolization cases are measured.

5. *Permitting This Case To Proceed To Discovery Would Not Threaten Consumer Interests*

Both Verizon and the Government stress that the antitrust laws should *not* be applied in a way that creates an inappropriate incentive for firms to pull their competitive punches. Pet. Br. 23; Gov. Br. 16. That can happen if vigorous antitrust enforcement is brought to bear in an attempt to root out highly speculative anticompetitive conduct that is difficult to distinguish from procompetitive behavior. Predatory pricing is the classic example. Competitive price cuts are hard to distinguish from predatory ones. If predatory pricing claims are too easy to prove, law abiding firms may compete less vigorously in order to avoid the threat of an antitrust case or investigation. As then-Judge Breyer explained, and this Court later recognized, "we must be

concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Matsushita*, 475 U.S. at 594 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)).

The government urges the Court to extend the cautious approach applied in predatory pricing cases to unilateral refusal-to-deal cases. Consumers might lose the benefits of vigorous competition, it argues, if monopolists felt compelled to cooperate with inefficient rivals to avoid the expense of defending an antitrust case. Although the United States is right to urge caution in refusal-to-deal cases, its proposed rule of *per se* legality whenever a monopolist does not incur short-run losses finds no support in the case law and would permit too much anticompetitive behavior to slip beneath the radar screen.

This Court has repeatedly shunned the sort of *per se* rule suggested by the Government here. "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Kodak*, 504 U.S. at 466-67 (quoting *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563, 579 (1925)). Even in situations less likely to result in consumer harm than the one at issue here, the door to potential liability has invariably been left open. For example, this Court has rejected *per se* liability for many vertical agreements while permitting antitrust scrutiny under the Rule of Reason.[3] Similarly, in predatory pricing cases this Court

---

[3] *NYNEX v. Discon*, 525 U.S. 128, 135 (1998) (recognizing that a decision to enter a vertical supply agreement with one supplier rather than another could violate antitrust laws if plaintiff could prove "harm, not just to a single competitor, but to the competitive process"); *State Oil Co. v. Khan*, 522 U.S. 3, 22 (1997) (emphasizing "we of course do not

has required proof of a reasonable likelihood that the defendant would be able to recoup its losses, a necessary prerequisite to any consumer injury, but it has shunned rules that would impose *per se* legality for low pricing behavior that is unlikely to cause consumer harm.[4]

To justify the sort of rule the United States urges upon this Court, a defendant would be required to show that a monopolist's refusal to deal "always or almost always . . . enhance[s] competition." *Kodak*, 504 U.S. at 479. Particularly given Congress's explicit finding in the Telecommunications Act of 1996 that interconnection in local telephone service would benefit consumers, Verizon simply cannot meet that heavy burden. In this sense, Trinko's allegations are similar to those in *Kodak*. There, the Court rejected an analogy between a refusal to sell spare parts to ISOs and predatory pricing. "Because cutting prices to increase business is 'the very essence of competition,'" this

---

hold that all vertical maximum price fixing is per se lawful . . . [it] should be evaluated under the rule of reason"); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (explaining that "[w]hen anti-competitive effects are shown to result from particular [non-price] vertical restrictions they can be adequately policed under the rule of reason").

[4] *See, e.g., Brooke Group v. Brown & Williamson*, 509 U.S. 209, 229 (1993) ("A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly. However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability . . . . We decline to create a *per se* rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing."); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 121 (1986) ("the United States invites the Court to adopt in effect a *per se* rule 'denying competitors standing to challenge acquisitions on the basis of predatory pricing theories.' . . . We decline the invitation.").

Court reasoned, "mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws are designed to protect.'" *Id.* at 478. But Kodak's conduct, like Verizon's here, was "just the opposite." *Id.* Far from benefitting consumers as lower prices would, Kodak's higher service prices and market foreclosure of ISOs had an immediate negative impact on consumers. It limited their choice of service providers and likely required them to pay higher prices for service.

Verizon's failure to provide efficient interconnection has the same negative impact on consumer choice and price. In each case, the challenged conduct "is facially anticompetitive and exactly the harm that antitrust laws aim to prevent." *Id.* The balance this Court struck when evaluating *Kodak*'s refusal to sell parts to ISO's is thus equally appropriate here: "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Id.* at 479

D. The Telecommunications Act Of 1996 Strengthens Trinko's Monopolization Claim

Both Verizon and the United States correctly conclude that the 1996 Act does not preempt the application of the antitrust laws to this market. Pet. Br. 35; Gov. Br. 6. Nevertheless, Verizon all but takes back its concession, by contending that the involvement of regulators in local telephone service makes antitrust liability inappropriate here. Pet. Br. 12. Far from blocking antitrust scrutiny, the procompetitive goals of the 1996 Act weigh in favor of finding antitrust liability in this case.

1. *Regulatory Review Does Not Supplant Antitrust Review*

As an initial matter, Verizon's claim that the regulatory oversight created by the 1996 Act is so pervasive that

antitrust review is unnecessary cannot be squared with the Act's antitrust savings clause. In declaring that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws," 47 U.S.C. § 152, Congress could not have been clearer in its intent to preserve antitrust duties alongside the obligations imposed by the 1996 Act.

Even putting the savings clause aside, however, this Court has never held that a regulatory system designed to further consumer-welfare-enhancing competition—the very same goal that the antitrust laws pursue—could preempt antitrust scrutiny. As Congress described it, the purpose of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L. No. 104-104, 110 Stat. 56, 56 (1996).

The regulatory schemes examined by this Court in the past pursued social policy goals other than competition, such as market stability and equal access. *Cf. Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975) (explaining that antitrust focuses solely on consumer welfare while the Securities and Exchange Commission "must consider, in addition, the economic health of the investors, the exchanges, and the securities industry."). These cases rested on the assumption that regulators charged with the duty to balance those competing goals should be allowed to do their work without interference by the courts.[5] By contrast, the 1996 Act places only procompetitive, consumer-welfare-maximizing goals on the table. Courts have long applied those goals in complex antitrust cases, so there is no reason to preempt

[5] Steven Semeraro, The Antitrust-Telecom Connection, 40 San Diego L. Rev. 555, 588-90 (2003).

antitrust scrutiny of cases arising under the 1996 Act simply because regulators also have a role to play.[6]

Even if the 1996 Act required the sort of balancing between competitive and non-competitive goals required by prior regulation—which it does not—preemption would be nonetheless inappropriate here. In deciding whether to apply antitrust to a regulated industry, this Court has long focused on whether regulators, as opposed to private parties, in fact call the competitive shots. It has compared this quintessentially factual question to "causation inquiries," because judges must ask whether regulators play "a substantial role in determining the specifics of the economic policy." *FTC v. Ticor Title Ins.*, 504 U.S. 621, 633 (1992). Justice Douglas, a former regulator himself, emphasized the point in his concurring opinion in *Gordon v. New York Stock Exchange, Inc.*: "The mere existence of a statutory power of review by the SEC . . . cannot justify immunizing [broker conduct] from antitrust challenges . . . . Only if the SEC is actively and aggressively exercising its powers of review and approval can we be sure that [the challenged conduct is] being monitored in the manner which Congress intended." 422 U.S. 659, 691-92 (1975) (Douglas, J., concurring).

Verizon says that administrative scrutiny under the 1996 Act is pervasive enough to guard against anticompetitive behavior by ILECs. Conversely, however, at the time the 1996 Act became law, top officials at the United States Department of Justice, Antitrust Division, expressed serious questions about the likely effectiveness of the regulator's remedial powers. In late-1997, then-Assistant Attorney General Joel Klein expressed concern that "the Act itself calls for no real penalties for non-compliance . . . ."[7] More

[6] *Id.* at 590-91.

[7] Joel I. Klein, The Race for Local Competition: A Long Distance Run, Not a Sprint 6-7 (Nov. 5, 1997) (available at http://www.usdoj.gov/atr/public/speeches/1268.htm).

recently, a former Senior Counsel to the AAG echoed Klein and raised the possibility that ILECs may come to view regulatory fines as a cost worth bearing to retain their monopoly position.[8] Given these concerns, the sufficiency of regulatory supervision under the 1996 Act is a fact question not amenable to resolution on the pleadings. *Cf. Gordon*, 422 U.S. at 687 (stressing that a court appropriately refuses to exempt regulated conduct from antitrust scrutiny where there is "no *evidence* presented regarding the extent of [regulatory] review . . . ."(emphasis added)).

2. *The 1996 Act Should Weigh In Favor Of Finding Antitrust Liability*

Even when economic regulation does not supplant antitrust review, it affects the competitive conditions that producers face. As the late Philip Areeda and Herbert Hovenkamp have explained, "antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation." IA Philip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 240c3 (1997). Traditional regulatory regimes may increase a plaintiff's burden in an antitrust case, because a regulated entity may find it more difficult to exercise market power in pricing, for example, if its prices are subject to regulation. *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990).

But regulation is not a one way ratchet. In appropriate cases, the existence of a regulatory duty may enable courts to confidently condemn conduct under the antitrust laws that might otherwise be too hard to distinguish from pro-competitive behavior. Regulation does not transform lawful conduct into unlawful conduct. But it does play a role in the

[8] Philip Weiser, Federal Common Law, Cooperative Federalism, and The Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1757-60 (2001).

evidentiary inquiry into whether a court should prohibit a certain practice in a particular industry. *Cf. Otter Tail Power*, 410 U.S. at 381 (relying on need for Commission approval of interconnection in upholding antitrust judgement).[9]

With respect to a unilateral refusal to deal in an unregulated market, courts must take care not to over-deter anticompetitive refusals and thereby chill vigorous competition by monopolists. As *Aspen* and *Kodak* make clear, all unilateral refusals in unregulated markets cannot escape antitrust scrutiny. Nevertheless, courts proceed with extreme caution. Where, as here, however, Congress has determined that a particular type of cooperation—interconnection and the provision of certain local telephone services—will enhance consumer welfare by enabling competition to emerge more quickly, courts can more confidently apply the antitrust laws to a monopolist's refusal to deal that transgresses the regulatory requirement. The monopolist does not violate the Sherman Act because it breaches a regulatory duty, but courts should not ignore Congress's views about the types of cooperation that will enhance consumer welfare when inquiring into the legality of the monopolist's refusal. In this light, the 1996 Act essentially constitutes a legislative finding that interconnection in local telephone service is necessary to enable competition to serve its usual consumer-welfare-enhancing function. Courts should respect that finding, if not defer to it.

The Seventh Circuit reached much the same conclusion in *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), a case that was instrumental to introducing competition into the long distance telephone service market. MCI alleged, and the jury imposed, antitrust liability on AT&T for refusing to permit *multipoint*

[9] *See also* Philip J. Weiser, Goldwasser, The Telecom Act and Reflections on Antitrust Remedies, 55 Admin. L. Rev. 1 (2003).

interconnection. This type of interconnection would have enabled MCI to reach AT&T's customers in cities where MCI had no facilities of its own. But the FCC had not ordered AT&T to interconnect in this way. Although the Seventh Circuit upheld antitrust verdicts against AT&T for failing to interconnect in regions where MCI had facilities, and the FCC had previously ordered AT&T to interconnect, the court overturned the multipoint verdict.

Verizon cites this holding as support for its argument that antitrust liability cannot exist here. Pet. Br. 42. In fact, however, the Seventh Circuit's reasoning supports the opposite result in this case. In overturning the jury's verdict for MCI, the court carefully explained that AT&T's refusal to provide multipoint interconnection was not actionable *because the FCC had never required it.* If the FCC had mandated multipoint interconnection as a regulatory duty, and AT&T had refused, the Seventh Circuit could have more confidently concluded that cooperation of that sort was procompetitive and permitted the verdict to stand. *Id.* at 1149.

Here, of course, the 1996 Act does require Verizon to provide the interconnection services that Trinko alleges it did not provide. Because Congress imposed that obligation on ILECs like Verizon specifically to enhance competition in local telephone service, the amended complaint states a § 2 claim.

3. *The 1996 Act Does Not Create Anticompetitive Duties*

Verizon suggests that—despite Congress's intention to open local telephone service to competition—the duties it imposed are actually inconsistent with the antitrust laws in large part because they impose on ILECs a brand new duty to share their resources at "heavily discounted prices." Pet. Br. 2. Although the conduct required by the 1996 Act may be new to the historically monopolistic local telephone service

market, it is hardly unheard of in the comparable, but competitive, long distance market. Interconnection, bulk sales of capacity, and the shared use of local loops and other network elements have all been commonplace in that market. It is certainly permissible to presume at the pleading stage that practices that flourish in a competitive market will also prove to be procompetitive in a comparable, but as yet monopolistic market, when competition is introduced there. Indeed, the Court made exactly that point in *Aspen*, explaining that cooperation among ski operators to offer all-mountain lift tickets in competitive ski markets was sufficient evidence to enable a jury to conclude that cooperation of that type is efficient. *Aspen*, 472 U.S. at 603. At the end of the day, Verizon may be able to show that the duties imposed by the 1996 Act are different in significant ways from the similarly appearing common practices in the long distance market. At this point, however, it certainly does not contradict antitrust principles as a matter of law to uphold duties that can be expected to hasten the demise of the vestiges of monopoly control in the local service market.

Verizon also questions whether courts can administer regulatory duties and implement pricing standards. Permitting a monopolization claim based on frustrating the interconnection required by the 1996 Act as alleged in this case, however, would hardly compel the court to administer the 1996 Act. With respect to liability, the standards of the Sherman Act, not those of the 1996 Act, must control. Further, courts would be required to carefully tailor any injunctive remedy so as not to interfere with regulatory activity. Punishing Verizon for intentionally undermining interconnection efforts, and ordering it not to engage in that improper conduct going forward, would not embroil the courts in pricing or other regulatory issues.

As for Verizon's concern with price levels, discounted prices benefit consumers and thus do not usually conflict with

the antitrust laws. Mandated prices that are too low could theoretically harm consumers by forcing a producer to lower quality and blunting its incentives to innovate. Whether the prices required by the 1996 Act in the local telephone service market are low enough to have these anti-consumer effects is a distinctly factual question that cannot be resolved on the pleadings. The language of the statute, and litigation to date, however, strongly suggest that the prices charged under the 1996 Act are not anticompetitively low. Congress instructed regulators to take account of "technological advancement" as well as "vigorous economic competition." 47 U.S.C. §257(b). More specifically, Congress required cost-based rates for network elements that may include a reasonable profit, 47 U.S.C. § 252(d)(1), and a wholesale rate for bulk sales of local telephone service that backs out only those costs avoided by the ILEC when selling capacity in bulk, 47 U.S.C. § 252(d)(3). Neither of these standards seems likely to produce rates so low as to compromise quality or innovation, particularly given the outcome of judicial review of the methodologies adopted by the FCC. *Verizon v. FCC*, 535 U.S. 467, 497-528 (2002) (upholding standard for pricing unbundled network elements as consistent with statutory language); *Iowa Utilities Bd v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000) (holding that ILEC must discount bulk sale rate under the 1996 Act only by amount of costs actually avoided), *rev'd in part on other grounds*, *AT&T v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

Lastly, Verizon contends that pure resale arrangements provide little benefit to consumers because they introduce competition only in the marketing of the service. Pet. Br. 30. In certain industries, marketing competition may provide significant consumer benefit. And even if re-selling provided only minimal benefits, it might well enable faster and more wide-spread entry that would hasten consumer-welfare-enhancing facilities-based competition. At a minimum, Trinko is entitled to the presumption at the pleading stage that

Congress knew what it was doing in mandating the sale of local service in bulk as one tool to stimulate competition in local telephone service.

II. NEITHER THE ESSENTIAL FACILITIES NOR MONOPOLY LEVERAGING DOCTRINES ARE AT ISSUE HERE

Verizon and the United States make much of the Court of Appeals' references to the so-called essential facilities and monopoly leveraging doctrines. The amended complaint, however, does not overtly rely on either type of claim, and there is no reason for this Court to address it here.

To the extent that Verizon and the Government intend to argue that generic monopolization tests untied to the competitive conditions in a particular industry may yield erroneous results, they make a valid point. This Court has made clear that to properly evaluate a non-*per se* antitrust claim, judges must make "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," and then "explain the logic of their conclusions . . . to subject . . . [them] to others' critical analyses . . . ." *California Dental Ass'n. v. FTC*, 526 U.S. 756, 780-81 (1999). Simply applying the elements of the essential facilities or monopoly leveraging doctrines woodenly without examining the likely competitive effects of a particular restraint in a particular market would no doubt yield bad results in some cases. For example, the sharing of a facility that cannot reasonably be duplicated may have anticompetitive effects if it adds administrative costs but no cost savings. Forced sharing may be procompetitive, however, if it enables efficient competition that would not otherwise result. In the local telephone service market in which interconnection is a necessary component of efficient competition, the forced sharing of the facilities necessary for interconnection is likely to be pro-competitive. Once again, however, that issue requires a factual record that is simply not present at this juncture.

Similarly, leveraging monopoly power from one market to another may benefit consumers by stimulating competition in the second market. In other cases, it may distort market behavior in ways that could reduce consumer welfare. The allegations in this case indicate that Verizon is maintaining its monopoly power in the retail market for local service, rather than leveraging that power in an attempt to gain some advantage in the wholesale market. At least at this early stage, leveraging would appear to have no role to play in this case.

In appropriate cases, the essential facilities and monopoly leveraging doctrines may provide useful tools to a court engaging in an appropriately careful market-specific analysis. Certainly nothing in this case, or in the recent circuit court law more generally, would justify this Court taking up either doctrine without a developed record on which to judge its application to a particular set of facts.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit and remand this case for the development of a record sufficient to address the antitrust claims raised by the amended complaint.

Respectfully submitted,

STEVEN SEMERARO *
Associate Dean for Academics &
Associate Professor of Law
THOMAS JEFFERSON SCHOOL OF LAW
2121 San Diego Avenue
San Diego, CA 92116
(619) 297-9700

* Counsel of Record

APPENDIX

Supporting Law Professors

Joseph P. Bauer, Professor of Law
University of Notre Dame Law School

Linda Berger, Professor of Law
Thomas Jefferson School of Law

Peter Carstensen
University of Wisconsin School of Law

John Flynn, Professor of Law
S.J. Quinney College of Law
University of Utah

Harry S. Gerla, Professor of Law
University of Dayton School of Law

Thomas Golden, Professor of Law
Thomas Jefferson School of Law

Michael J. Hutter
Albany Law School

Steven Semeraro
Thomas Jefferson School of Law